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Current Scams

Fraudulent Court Order Seeking Payment

Alien received a *fake order*, purportedly from the Cleveland Immigration Court, that denied cancellation of removal and voluntary departure and ordered removal, but simultaneously sought a cash payment. While designed to look like a legitimate order, the fraudulent document contained omissions and was illogical. However, be on the lookout for similar fraudulent documents possibly with less obvious flaws.

10-year Green Card Scam

Alien promised lawful permanent residence based upon having lived in U.S. for 10 years. Alien is then told to sign a boilerplate, frivolous, or blank asylum application which is filed with DHS. If denied, the expectation is that alien will be placed in removal proceedings where the asylum application will be withdrawn and alien will pursue cancellation of removal before the Immigration Judge. Often, alien does not have a qualifying relative or is otherwise ineligible for such relief resulting in an order of removal.

42B Receipt for EAD Only

EOIR-42B application is presented to DHS which sets forth facts establishing that the applicant does not qualify for the relief in order to obtain a fee receipt that can be used to obtain an Employment Authorization document from DHS, but the application is never filed with the Immigration Court and the applicant is charged for the filing of an application that was never filed and for which they were never eligible. The scam involves fraud against both the government, through the improper acquisition of employment authorization, and the applicants, who are charged fees for the filing of applications for which they are not *prima facie* eligible and which they cannot and do not pursue.

Boilerplate Affidavits

The same generic affidavits are being submitted in support of multiple applications in unrelated cases with only the information relevant to the identity of the particular immigrant being changed.

Impersonating Government Employees

EOIR's Fraud Program has received numerous complaints about scams involving impersonation of government employees. These include impersonation of EOIR employees, including one complaint that an individual was impersonating EOIR's Fraud Program Investigator. Other scams involve impersonating ICE or USCIS employees, contacting immigrants by telephone or in person and demanding money to fix their immigration status or avoid removal.

DHS OIG Hotline Number Used in Scam to Obtain PII

The U.S. Department of Homeland Security, Office of Inspector General, has issued a fraud alert to warn that the DHS OIG Hotline telephone number has been used recently as part of a telephone spoofing scam targeting individuals throughout the country. The perpetrators of the scam represent themselves as employees with "U.S. Immigration" and can alter caller ID systems to make it appear that the call is coming from the DHS OIG Hotline telephone number (1-800-323-8603). The scammers demand to obtain or verify personally identifiable information from their victims through various tactics, including by telling individuals that they are the victims of identity theft.

Unauthorized Practice of Law

Most often seen in three variations: 1) Immigration Consultants (sometimes referred to as notarios) who hold themselves out as attorneys or who immigrants believe to be attorneys who enter into contractual agreements to assist immigrants by providing advice regarding the immigration law and creating and filing applications for benefits on the immigrant's behalf; 2) Legal Assistants affiliated with attorneys who actually direct the prosecution of the immigrant's legal proceedings with the attorney, usually young and inexperienced (sometimes referred to as "baby" attorneys) merely acting as a front for the "assistant." In this scenario, both the attorney and the "legal assistant" may be part of a broader criminal smuggling organization; 3) Individuals who work or volunteer for non-profits who have some knowledge of immigration law and procedure but are not attorneys who provide legal advice concerning applications that should be filed or claims that should be made.

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U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

May 17, 2017

MEMORANDUM TO: James McHenry
Director (Acting)

FROM: Jean King
General Counsel

SUBJECT: Reporting Fraud and Abuse

I. Introduction

The Executive Office for Immigration Review (EOIR), Office of the General Counsel (OGC), has been asked to provide a legal opinion regarding the following issues related to reporting fraud and abuse to EOIR's Fraud and Abuse Prevention Program (Fraud Program):

- (1) Will an immigration judge or other court staff violate confidentiality laws, such as protections under the asylum regulations or Violence Against Women Act, or the Privacy Act if they make a report to the Fraud Program?
- (2) Does reporting suspected fraud from a case before an Immigration Judge to the Fraud Program create an appearance of impropriety or bias for an Immigration Judge?

II. History and Organization of the Fraud and Abuse Prevention Program

EOIR's Fraud Program was created as a result of a directive in 2006 by then-Attorney General Alberto Gonzales entitled the "Attorney General Report on Measures to Improve Immigration Courts and the Board of Immigration Appeals." Measure Twenty-One, "Referral of Immigration Fraud and Abuse" instructed the Director of EOIR, "in consultation with the Director of the Executive Office for United States Attorneys," to "develop a procedure by which immigration judges and Board members may refer cases of immigration fraud and abuse to the appropriate investigative body for appropriate action, including possible future referral to and prosecution by the U.S. Attorney's Office."

As a result of this measure, EOIR promulgated 8 C.F.R. section 1003.0(e)(2), which directs EOIR's General Counsel to designate a fraud officer to:

- (i) Serve as a point of contact relating to concerns about possible fraud upon EOIR, particularly with respect to matters relating to fraudulent applications or documents affecting multiple removal proceedings, applications for relief from removal, appeals, or other proceeding before EOIR;
- (ii) Coordinate with investigative authorities of the Department of Homeland Security, the Department of Justice, and other appropriate agencies with respect to the identification of and response to such fraud; and
- (iii) Notify the EOIR disciplinary counsel and other appropriate authorities with respect to instances of fraud, misrepresentation, or abuse pertaining to an attorney accredited representative.

EOIR's first Fraud and Abuse Prevention Counsel was designated in 2007. Since that time, the Fraud Program has grown to a team consisting of the Fraud and Abuse Prevention Counsel, one additional full-time attorney and one part-time attorney working part-time on the program, a full-time investigator, and a paralegal. The Fraud Program personnel work closely with law enforcement and prosecutors on the federal, state, and local levels to investigate and prosecute fraud in all forms, and coordinate with EOIR's Attorney Discipline Program or state bar counsel to seek discipline of attorneys or accredited representatives who commit or enable fraud.

III. Analysis

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III. Conclusion

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Document Fraud in Immigration Proceedings: **A Brief Overview of the Law**

In the course of removal proceedings, Immigration Judges may encounter allegations or proven instances of document fraud. Document fraud can affect immigration adjudications in a variety of ways, from the filing of fraudulent applications to the creation of a basis for removal. This article seeks to provide a brief overview of the law pertaining to document fraud. In particular, the Fraud and Abuse Prevention Program hopes that this article can serve as a quick reference guide of sorts for Immigration Judges dealing with potential or verified document fraud in their cases.

First, Immigration Judges may be faced with document fraud in the form of a false application. In the asylum context, false applications may be found frivolous under INA § 208(d)(6). Under *Matter of Y-L-*, 24 I&N Dec. 151, 155 (BIA 2007), an Immigration Judge can find an asylum application to be “frivolous” where four criteria are met: “(1) notice to the alien of the consequences of filing a frivolous application; (2) a specific finding by the Immigration Judge or the Board that the alien knowingly filed a frivolous application; (3) sufficient evidence in the record to support the finding that a material element of the asylum application was deliberately fabricated; and (4) an indication that the alien has been afforded sufficient opportunity to account for any discrepancies or implausible aspects of the claim.” The Board of Immigration Appeals (“BIA”) expressly noted that the term “frivolous” is more akin to “fraudulent” under the statute because there must be evidence of a deliberate fabrication of a material element of a claim. *Id.* at 155 n.1. The Immigration Judge can base a frivolousness finding on pertinent facts from an adverse credibility finding, so long as the materiality and deliberateness elements are established. *Matter of B-Y-*, 25 I&N Dec. 236, 240 (BIA 2010).

In *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006), the Sixth Circuit reviewed an Immigration Judge’s frivolousness finding derived from alleged document fraud. Specifically, the Immigration and Naturalization Service (“INS”) had granted asylum to the applicant but later terminated his status due to evidence set forth in two Department of State memoranda indicating that the applicant’s supporting documents were forgeries. *Id.* at 398-400. Such evidence in combination with an INS agent’s testimony led the Immigration Judge to find the applicant incredible and the application frivolous. *Id.* at 403. The Sixth Circuit disagreed, concluding that in the absence of additional evidence about the basis of the Department of State’s findings (such as who conducted the investigation and how the investigation was carried out), the memoranda were neither reliable nor trustworthy indicators of document fraud. *Id.* at 407. As such, the court vacated the finding of frivolousness. *Id.*

Likewise, in *Lin v. U.S. Dep’t of Justice*, 459 F.3d 255 (2d Cir. 2006), the BIA relied on a Department of State report finding that the applicant’s certificate of release from prison in China was a forgery to reverse the Immigration Judge’s positive credibility finding. As in *Alexandrov*, the court determined that the BIA could not rest an adverse credibility finding on the Department of State report; specifically, the court noted that the report contained hearsay from Chinese officials and gave insufficient information regarding the identity and qualifications of the investigator(s), the objective and extent of the investigation, and the methods used to verify the information discovered. *Id.* at 269-72. Thus, “[l]ike any other adverse factual finding, the BIA’s conclusion

that an applicant has filed a forged document must be supported by substantial evidence.” *Id.* at 269.

By contrast, the Ninth Circuit relied on a Department of State overseas investigation’s findings of document fraud to affirm an adverse credibility determination. *Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 896 (2016). The Department of State had concluded that two subpoenas submitted by the asylum applicant were forgeries, and the Immigration Judge relied on that conclusion in finding the applicant not credible. *Id.* at 897-88. The Ninth Circuit endorsed the Immigration Judge’s reliance on the Department of State report. First, the court expressed frustration at the frequency with which document fraud arises in the asylum context:

This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. . . . The schizophrenic way we administer our immigration laws creates an environment where lying and forgery are difficult to disprove, richly rewarded if successful and rarely punished if unsuccessful.

Id. at 901. Given this background, the court rejected the need for more detailed Department of State reports on document fraud, asserting that “[i]nsisting on these procedures would paralyze the process, making it impossible for our consular officers to do many of these investigations because they’re too busy filling in all the jots and tittles our sister circuit enshrines as pre-requisites for a document’s admission.” *Id.* at 906. Accordingly, the court supported the continued use of Department of State reports as a tool against document fraud:

The use of reports from consular officials gives the government the ability to check facts and puts at least some constraint on how far from the truth asylum applicants will stray. Knocking out even this most basic check on fraud and fabrication would subvert the asylum process, giving charlatans a free pass into the United States.

Id. at 907.

Beyond consular reports, scientific analyses uncovering document fraud can support an adverse credibility finding. In *Matter of O-D-*, the BIA addressed document fraud committed as part of the adjudication process (as opposed to other stages of the immigration process, such as flight from the country of origin or attempted entry into the United States).¹ 21 I&N Dec. 1079, 1081 (BIA 1998). There, an asylum applicant submitted purported identity documents in support of his application, but a forensics report from the Forensics Document Laboratory (now the Forensics Laboratory) showed that the documents were counterfeits. *Id.* at 1079. The BIA held

¹ As the BIA remarked: “Ordinarily, it is reasonable to infer that a respondent with a legitimate claim does not usually find it necessary to invent or fabricate documents in order to establish asylum eligibility. On the other hand, there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel.” *Id.* at 1083. Consequently, courts have held that use of a fraudulent document to escape the country at issue is not fatal to an asylum claim. *E.g.*, *Gulla v. Gonzales*, 498 F.3d 911, 916-17 (9th Cir. 2007); *Shtaro v. Gonzales*, 435 F.3d 711, 717 (7th Cir. 2006); *Nreka v. U.S. Att’y Gen.*, 408 F.3d 1361, 1368-69 (11th Cir. 2005).

that the presentation of the counterfeit documents, in combination with the applicant's inability to provide a rebuttal explanation, "create[ed] serious doubts regarding the respondent's overall credibility." *Id.* at 1083. That is, "[s]uch fraud tarnishes the respondent's veracity and diminishes the reliability of his other evidence." *Id.* In relying on the report of the Forensics Document Laboratory, the BIA rejected the applicant's argument that the report was unreliable. *Id.*

However, an Immigration Judge's conjecture regarding the authenticity of documents may not be given deference by a circuit court of appeals. In *Niang v. Mukasey*, 511 F.3d 138, 141 (2d Cir. 2007), the Second Circuit stated that "where . . . an applicant's testimony is otherwise credible, consistent and compelling, the agency cannot base an adverse credibility determination solely on a speculative finding that the applicant has submitted inauthentic documents in support of his application." The Immigration Judge concluded that the asylum applicant's identity document and refugee card were not genuine, based on the Immigration Judge's speculation and his skepticism about the applicant's explanations. *Id.* at 144. The Second Circuit acknowledged that an Immigration Judge may make an adverse credibility finding stemming from document fraud without a forensics report. *Id.* at 146 ("Though often helpful, an expert report will not be necessary in every case to support a finding that a document is fraudulent. An IJ is fully entitled to make findings concerning the authenticity of submitted evidence, based on her own examination and her professional analysis."). However, in this case, the Immigration Judge's speculation, without more, did not provide a sufficient basis to support the adverse credibility finding given that the applicant was otherwise credible. *Id.* Under such circumstances, the adverse credibility finding will be afforded deference only if "the fact-finder has reason to believe that the applicant knows or suspects that the document is false." *Id.*

Similarly, the Ninth Circuit has rejected an Immigration Judge's "conjecture" regarding apparent peculiarities on a death certificate as a basis for an adverse credibility finding. *Kumar v. Gonzales*, 444 F.3d 1043, 1050-51 (9th Cir. 2006). Specifically, the Immigration Judge engaged in a visual comparison of certain handwriting (two different number fours) and concluded that the death certificate was a forgery. *Id.* at 1050. The court noted the Immigration Judge's decision to not "submit[] the documents to a handwriting expert or forensic laboratory for review or testing" as a further reason to reject the adverse credibility finding. *Id.* Thus, as in *Niang*, forensic verification of the Immigration Judge's instincts may have led the circuit court to be more deferential toward the adverse credibility finding.

In addition, document fraud constitutes a distinct basis for removability. For example, an alien may be subject to removal due to a conviction for a document fraud aggravated felony. INA § 101(a)(43)(P). The aggravated felony provision under paragraph (P) of INA section 101(a)(43) applies to, *inter alia*, document fraud offenses described under 8 U.S.C. § 1546(a),² "except in the case of a first offense for which the alien . . . committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of [the INA]." INA § 101(a)(43)(P). Although the determination of a qualifying document fraud offense calls for a categorical (elements-based) inquiry, the "family exception" requires the Immigration Judge to use the circumstance-specific approach, delving into the specific facts of the document fraud at issue. See *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009); *Adewuyi v.*

² 8 U.S.C. § 1546(a) includes possession or use of authentic immigration documents obtained by fraud. *United States v. Kouevi*, 698 F.3d 126 (3d Cir. 2012).

Holder, 508 F. App'x 816, 820 (10th Cir. 2013) (unpublished) (assessing alien's claim under the "family exception").

Moreover, aliens convicted of offenses relating to document fraud may be removable for having committed crimes involving moral turpitude ("CIMT"). For instance, in *Nino v. Holder*, 690 F.3d 691, 696 (5th Cir. 2012), the Fifth Circuit held that a conviction for unlawful possession of fraudulent identifying information – which penalized obtaining, possessing, transferring, or using identifying information of another person without the other person's consent and with intent to harm or defraud another – was for a CIMT. Likewise, knowingly transferring an identification document or a false identification document knowing that such document was stolen or produced without lawful authority is a CIMT offense. *Lagunas-Salgado v. Holder*, 584 F.3d 707, 711-12 (7th Cir. 2009). Additionally, the BIA has held that uttering and selling false and counterfeit papers relating to registry of aliens involves moral turpitude, in part because the offense "thwarts [the government's] purpose of requiring aliens to have proper documentation to enter the United States." *Matter of Flores*, 17 I&N Dec. 225, 228-30 (BIA 1980). By contrast, simple possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a CIMT. *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992).

Lastly, an alien subject to a final order under the document fraud provisions of INA § 274C is removable. INA §§ 212(a)(6)(F), 237(a)(3)(C); *Walters v. Reno*, 145 F.3d 1032, 1036 (9th Cir. 1998) ("Such an order renders the alien deportable and permanently excludable."). Section 274C proscribes several activities, making it unlawful:

- (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter,
- (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter or to obtain a benefit under this chapter,
- (3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter or obtaining a benefit under this chapter,
- (4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title or obtaining a benefit under this chapter, or
- (5) to prepare, file, or assist another in preparing or filing, any application for benefits under this chapter, or any document required under this chapter, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document

was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.

INA § 274C(a). Generally, an alien will be subject to a final order under INA § 274C when an administrative law judge with the Office of the Chief Administrative Hearing Officer determines that the alien has violated one of the provisions of paragraph (a). INA § 274C(d)(2)(C); 8 C.F.R. § 1270.2. The Attorney General may waive removability stemming from a 274C order, under limited circumstances, pursuant to INA sections 212(d)(12) and 237(a)(3)(C)(ii). However, an alien is not entitled to a waiver under INA § 212(i) for inadmissibility under INA § 212(a)(6)(F). *Matter of Lazarte-Valverde*, 21 I&N Dec. 214 (BIA 1996).